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SUPREME COURT, U.S.

No. 82-5308

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAROLD LAMONT OTEY,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

For the purposes of this Brief in Opposition to the Petition for Certiorari the respondent accepts the petitioner's statement of the case.

SUMMARY OF ARGUMENT

1. The petitioner has failed to raise any issue meriting the granting of the writ prayed for.

2. The proper standard for the evaluation of the effectiveness of the petitioner's trial counsel was employed by the state courts.

3. There exists no Sixth or Fourteenth Amendment right of a state prisoner to be present at a hearing requesting post conviction relief.

ARGUMENT

I.

NO ISSUE MERITING THE GRANTING OF A WRIT OF CERTIORARI HAS BEEN RAISED BY THE PETITIONER.

Rule 17.1 of the rules of this Court governing review on certiorari indicates that in most instances decisions of state courts will only be reviewed under the following circumstances:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Our review of the petitioner's brief fails to indicate that he seeks to claim the existence of any of the circumstances noted above.

The petitioner does not appear to challenge in any respect the appropriateness of the legal standards applied by the state court to his case, but instead seeks review of the factual determinations the state courts reached in applying those standards. This is not the function of a writ of certiorari.

II.

EFFECTIVE ASSISTANCE OF COUNSEL.

Particularly, with respect to the petitioner's numerous complaints concerning the effectiveness of his trial counsel the petitioner has not raised any complaint that the applicable federal constitutional standard was not properly employed by the state courts. In the absence of such an allegation and proof that the applicable standard in fact was abridged, the petition should be denied.

The type of review sought by the petitioner here is best afforded under 28 U.S.C. §2254 and not by the level of review sought here.

III.

THERE IS NO SIXTH AMENDMENT RIGHT TO BE PRESENT AT A POST CONVICTION HEARING.

Neb.Rev.Stat. §29-3001 (Reissue 1979) provides that a motion for post conviction relief may be heard "without requiring the production of the prisoner." In this instance the presence of the petitioner was not ordered. His testimony was introduced through deposition and appointed counsel represented his interests at the hearing. This procedure is in conformity with the long standing policy of the Nebraska courts that the attendance of a prisoner is not necessary at any post conviction phase of his criminal proceeding. State v. Wells, 197 Neb. 584, 591, 249 N.W.2d 904 (1977); State v. Woods, 180 Neb. 282, 284, 142 N.W.2d 339 (1966).

Several factors must be borne in mind. Initially, post conviction proceedings are purely a creature of state law and are not mandated by the Federal Constitution. As a creature of state law, the state is free to establish the procedural strictures of the process created. In this instance the state has chosen not to require the presence of the prisoner at a post conviction hearing.

The petitioner's reliance upon Morrissey v. Brewer, 408 U.S. 471 (1972), and Gaynon v. Scarpelli, 411 U.S. 778 (1973), is misplaced. Those cases concerned state initiated proceedings

which could ultimately result in the deprivation of a modicum of a state prisoner's freedom.

In this instance the state post conviction proceeding is not initiated by the state but by the prisoner. Furthermore, the outcome of this state civil proceeding cannot result in a deprivation of the prisoner's liberty. The process required by the Federal Constitution prior to the deprivation of the petitione s liberty was afforded him earlier at his criminal trial.

Finally, Morrissey and Gagnon only afforded the prisoner a limited right to counsel. In this instance the petitioner had the benefit of state afforded counsel throughout the post conviction process.

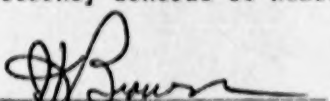
CONCLUSION

For each and all of the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THE STATE OF NEBRASKA,
Respondent

By PAUL L. DOUGLAS
Attorney General of Nebraska

By 

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Respondent's Brief in Opposition to the Petition for Certiorari have been served on the petitioner, Harold Lamont Otey, by mailing said copies, first class postage prepaid, addressed to his counsel of record, Mr. Michael L. Schleich, of Morsman, Fike, Davis & Schleich, P.C., 475 Continental Building, Omaha, Nebraska 68102.

Dated this 10th day of November, 1982.

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